SUPREME COURT, U.S.
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No. 3741

In the Supreme Court of the United States

OCTOBER TERM, 1970

MILLER-DAVIS COMPANY, a Corporation,

Petitioner,

vs.

PREMIER ELECTRICAL CONSTRUCTION COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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July 10, 1970

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The Petitioner Miller-Davis Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on March 6, 1970.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit not yet reported, appears in the appendix hereto.

The opinion of the United States District Court is reported at 292 F.Supp. 213, and also appears in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered March 6, 1970. A timely petition for rehearing *en banc* was denied on April 15, 1970, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether respondent, after judgment was entered in favor of petitioner in an earlier suit brought by respondent against petitioner alleging breach of contract, may relitigate its claim against petitioner by simply alleging a violation of Section 1 of the Sherman Act, when both suits arise out of the same transaction and have a "common nucleus of operative facts."

STATEMENT OF THE CASE

On or about March 11, 1968, the petitioner was served with the complaint in this case seeking damages for an alleged violation of the Sherman Act. Earlier in October, 1966, respondent had filed suit against petitioner alleging a breach of contract. Both suits were brought in the United States District Court for the Northern District of Illinois. The first suit filed went to trial on March 13, 1968, and was concluded March 27, 1968. The complaint filed in October, 1966 sought damages in the amount of Sixty-Five Thousand Dollars ($65,000.00) for breach of contract and by an amended two count complaint filed during the trial, also alleging breach of contract, this sum was reduced to Forty Thousand Dollars ($40,000.00) to conform to respondent's proof.

Both the original complaint and the amended complaint seeking damages for breach of contract and the complaint in the instant case arise out of the same occurrence, namely, the bidding for a certain construction project of the Atomic Energy Commission (hereinafter AEC) in Argonne, Illinois. The allegations in these three complaints, except as to the theory of recovery, are virtually identical.

Thus, in Paragraph 3 of the complaint in the instant case, respondent alleges that petitioner is "engaged in the general contracting business" (A. 5)[1], and in the amended complaint in paragraph 3 the same allegation is made (A. 42). In paragraph 5 of the instant complaint, respondent alleges that the AEC "operated a certain facility financed by public funds, known as Argonne National Laboratory in Argonne, Illinois," (A. 5) and in the amended complaint in paragraph 4 the same allegation is made (A. 42).

Likewise, in paragraph 6 of the instant complaint and paragraph 5 of the amended complaint, respondent alleges that the AEC sent invitations to various general contractors, including petitioner, to submit bids for a project known as Accelerator Improvement ZGS, FY-65 at Argonne National Laboratory (A. 5, 42). In paragraph 7 of the instant complaint and paragraph 6 of the amended complaint, it is alleged that a significant portion of the aforesaid project was composed of electrical work to be performed by an electrical contractor to be selected by the successful general contractor (A. 6, 42-43).

Paragraph 8 of the instant case and paragraph 7 of the amended complaint allege that some time subsequent to

[1] The Appendix which was filed in the Seventh Circuit Court of Appeals and re-filed in this Court is cited herein as "A." with the page number.

February 3, 1966 the petitioner sent out invitations to various electrical contractors, including respondent, to submit a bid for the electrical work (A. 6, 43).

The instant complaint went on to allege that petitioner and St. Arnaud Electric Co. "conspired to restrict the competition" of petitioner by inducing St. Arnaud's competitors, including respondent, to submit higher bids to petitioner's competitors (A. 6). Respondent also alleged that respondent submitted an oral bid to petitioner and that at that time petitioner advised respondent that if respondent would "protect" petitioner by submitting higher electrical bids to petitioner's competitors, petitioner would award the electrical contract to respondent if it was awarded the prime contract by the AEC (A. 7). Respondent alleged that it advised petitioner that it would "protect" petitioner provided petitioner would inform the respondent if it received a lower bid than respondent's bid in order that respondent could then make its bid available to petitioner's competitors, and that petitioner so agreed (A. 7-8).

The instant complaint further alleged that petitioner failed to advise respondent that it had received any bid that was competitive to respondent's bid, that petitioner was awarded the prime contract, and that it, in turn, awarded the sub-contract to St. Arnaud (A. 8). Respondent then prayed for relief because it was "damaged" by virtue of the foregoing in that it "was deprived of its fair and reasonable profit on the said electrical subcontract in the amount of $65,000" (A. 9).

In Count I of the amended complaint in the earlier action, respondent alleged that it gave petitioner an oral bid on March 3, 1966, and that petitioner then advised respondent that if respondent would "protect" the peti-

tioner by submitting higher bids to petitioner's competitors, petitioner would accept respondent's bid and award respondent the subcontract providing petitioner did not receive a lower bid. (A. 43-44). This Count also alleged that respondent made a "counter-offer" wherein respondent offered to "protect" petitioner's position providing petitioner advised respondent if it did receive a bid lower than respondent's at which time respondent would be released from its obligation to "protect" petitioner and that at no time thereafter did petitioner inform respondent that it received a lower electrical bid (A. 43-44). This earlier complaint also alleged that respondent did give higher bids to petitioner's competitors but that the electrical contract was awarded to St. Armand (A. 44). Respondent prayed for relief for the reason that it "was damaged in that it lost its fair and reasonable profit".

Count II of the amended complaint in the earlier action has the same prefatory allegations as Count I does; however, respondent then alleged that petitioner did not receive a lower bid than that submitted by respondent, and that this constituted the breach of contract (A. 45).

Because the complaint in the case at bar was simply another attempt to obtain relief for the alleged breach of contract, and because of the prior pending suit, petitioner filed a verified motion to dismiss (A. 18). This motion was filed on April 22, 1968, approximately one month after the trial had been concluded in the earlier action. The motion prayed for dismissal on the grounds of failure of the complaint to state a claim upon which relief could be granted, *res judicata* and the doctrine of *in pari delicto*. The trial judge after receiving extensive legal memoranda from the parties allowed this motion to dismiss and wrote an opinion (292 F.Supp. 213). Judgment was entered in favor of petitioner on September 20, 1968 (A. 36-37) on the grounds of *in pari delicto* and *res judicata*.

The trial judge in the earlier action, sitting without a jury, had taken the case under advisement and, after receiving findings of fact and conclusions of law and legal memoranda from the parties, entered judgment on the merits on September 23, 1968, (A. 68) and specifically found that there was no contract between the petitioner and respondent. His opinion is reported at 291 F.Supp. 295 (1968), and his judgment was affirmed by the Seventh Circuit Court of Appeals.

The Seventh Circuit Court of Appeals in reviewing the judgment based upon *in pari delicto* and *res judicata* reversed, holding that certain factual inquiries should be made by the trial judge in order to discern the applicability of *in pari delicto*. In addition, the court held that as to *res judicata* "since final judgment had not been rendered in the contract action when the decision was announced in the antitrust action, *res judicata* was inappropriate." The court further observed that petitioner maintains that this defect is now cured since final judgment has been entered on the contract action and stated, "[a]ssuming, without deciding that we should therefore affirm the district court on this basis, we, nevertheless, think that *res judicata* would be inapplicable to bar respondent's antitrust claim" for the reason that "[t]he antitrust claim rests primarily upon a conspiracy between petitioner and St. Arnaud to deceive respondent occurring prior to any dealings between" respondent and petitioner. The court then follows with a footnote which states that the district court's decision rests in part on the ground of comity and that "*[i]n light of our holding that the antitrust and contract actions constitute separate causes of actions*, we believe that comity would, at most, have justified a stay of the antitrust action pending the outcome of the contract action" ((Italics ours). The footnote makes it clear that

the court considers its decision as a holding on the question of what constitutes a cause of action, and, thus, this aspect of the case is ripe for review in this Court. This is particularly true in the case at bar for the reason that, if there was a defect with respect to the applicability of *res judicata* because of the lack of a final judgment, this situation existed for only three days. At the time this decision was being reviewed by the Seventh Circuit, there was a final judgment which was itself before the Court by an appeal of the suit first filed.

Because of the importance of the doctrine of *res judicata* to the administration of justice in the federal courts, petitioner seeks certiorari to this Court.

REASONS FOR GRANTING THE WRIT

I.

IT IS EXTREMELY IMPORTANT WITH RESPECT TO THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS FOR THE SUPREME COURT TO DEFINE THE APPLICATION OF RES JUDICATA IN LIGHT OF MODERN, LIBERAL PLEADING REQUIREMENTS.

Perhaps the single most important current challenge of the seventies to the judiciary is to provide relief to litigants promptly. The old adage that justice delayed is justice denied was never truer. Staggering backlogs and long delays in the termination of controversies will not restore confidence in our judiciary. There can be no doubt that the heavy burden of litigation now facing both state and federal courts is one of the most pressing problems of our society. See generally, Vestal: Rationale of Preclusion, 9 St. Louis U. L. Rev. 29, 32 (1964).

Although the efficient use of the doctrine of *res judicata* is surely not the complete answer to the perplexing problems facing our judiciary, it is one of the important means by which our courts can without any injustice speed up the disposition of litigation which has no utility to society. Our society can no longer afford the luxury of a second lawsuit based upon the same or related facts as was the subject matter of an earlier lawsuit. Despite the fact that all unsuccessful litigants would like a second chance for victory, society demands that the already congested court dockets be cleared. As Lord Coke stated in the celebrated *Ferrer's Case*: "The end of all humani laws" is "rest and quietness," *Ferrer's Case*, VI Coke 7 (1599).

The decision of the Seventh Circuit Court of Appeals in the instant case does not serve the societal need of providing speedy relief for litigants. On the contrary, this decision looks back to the days of narrow pleading requirements and the archaic concept of "cause of action". Rules 15, 18 and 19 of the Federal Rules of Civil Procedure permit a plaintiff in one action to sue for all grounds of relief, and with slight limitations, none of which are relevant in the instant case, to join all parties that are necessary in order to enable the plaintiff to properly prosecute its claim or claims. Commentaries to Rule 18, 28 U.S.C.A. 45.

As this Court recently observed in *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966):

> "Under the [Federal] Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."

There can be no doubt whatsoever that the respondent in the case at bar could have included its purported anti-trust claim in the first suit filed against petitioner, and that it could also have joined St. Arnaud, the co-defendant in the second suit, as a defendant in the first suit. Thus, respondent could have very easily sued for all the relief that it desired in its first lawsuit. Where there are liberal rules relating to pleading requirements such as there are in the Federal Courts, the whole trend of the law is directly contrary to the Seventh Circuit's decision in the case at bar. See Note, Developments In the Law—Res Judicata, 65 Harv. L. Rev. 818, 826 (1952).

As Professor James Wm. Moore has succinctly stated (1B Moore's Federal Practice ¶0.410 at 1160 [2d ed. 1965]):

> ". . . a second suit is needless in any forum whose procedural rules permit the presentation in one action

of all grounds for relief, whether legal or equitable, and whether the remedies sought are consistent or inconsistent. Sound authority supports this position."

Judge Goodrich placed this modern application of *res judicata* in proper perspective in *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F.2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) wherein he stated (pp. 469-470):

> "A reading of the early cases as compared with recent ones makes it clear that the meaning of 'cause of action' for res judicata purposes is much broader today than it was earlier. Formerly the whole aim in pleading, and in the elaborate system of writs, was to frame one single legal issue. That being the guiding principle, the phrase 'cause of action' came to have a very narrow meaning. If the theory in the second suit was unavailable under the writ used in the first suit, the plaintiff had no opportunity to litigate it there and so plaintiff was not barred by res judicata. The force of the rule is still operative but the scope of its operation has been greatly limited by the modernization of our procedure. The principle which pervades the modern systems of pleadings, especially the federal system, as exemplified by the free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims, is that the whole controversy between the parties may and often must be brought before the same court in the same action."

Thus, the Court of Appeals for the Third Circuit concluded that, because of the broadened scope of the doctrine of *res judicata*, it did not have to reach the question whether the allegation of conspiracy in the first suit filed, decided after the decision in a later suit, precluded the application of the doctrine, because *res judicata* was held applicable irrespective of what the cause of action was in the first suit—this for the simple reason that plaintiff should have included in the first suit decided all of his claims for recovery.

The decision of the Seventh Circuit in the case at bar demonstrates that a rigid application of the identity-of-causes-of-action test to determine whether *res judicata* applies clearly defeats the purpose of *res judicata*, namely, the elimination of needless litigation. Mr. Justice Frankfurter in *Angle* v. *Bullington*, 330 U.S. 183, 193 (1947), defined "needless litigation" in the following manner:

> "The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. [citing authority] And it has gone through if issues *that were or could have been dealt with in an earlier litigation are raised anew between the same parties.*" (Italics ours).

The broadened concept of cause of action finds expression in this Court in the area of pendent jurisdiction in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), and in the area of collateral estoppel in criminal cases in the special concurring opinion of Mr. Justice Brennan in *Ashe* v. *Swenson*, ... U.S. ....., 25 L.Ed.2d 469, 478 (1970).[2] The test of "common nucleus of operative facts" employed in the foregoing cases is one which this Court should carry over as the test of the applicability of *res judicata* to cut through the inherent confusion of the cause-of-action test.

Since the adoption by this Court of the significant changes, discussed above, in the Federal Rules of Civil Procedure, this Court has not addressed itself to the doctrine of *res judicata*. The decision in this case by the Seventh Circuit will stand as a bar to any attempt to broaden the concept of cause of action for *res judicata*

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[2] For a good discussion of the many sound reasons in favor of a test other than "cause of action", see Note, *UMW* v. *Gibbs and Pendent Jurisdiction*, 81 Harv. L. Rev. 657 (1968).

purposes. For these reasons, this Court should grant certiorari to review the scope of *res judicata* under the liberal pleading provisions of the Federal Rules of Civil Procedure and to establish guidelines for its use in the administration of justice in the federal courts.

II.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF RES JUDICATA.

In essence, the decision of the Seventh Circuit is that *res judicata* is not available to petitioner (Miller-Davis) because: "[t]he antitrust claim rests primarily upon a conspiracy between Miller-Davis and St. Arnaud to deceive Premier occurring prior to any dealings between Premier and Miller-Davis."

Thus, the court deems the allegation of conspiracy determinative, despite the fact that decisions such as *Koblitz v. Baltimore R. R. Co.*, 164 F.Supp. 367 (S.D.N.Y. 1958) and *Williamson v. Columbia Gas & Electric Corp.*, 186 F. 2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) also dealt with the allegation of a conspiracy and rejected the reasoning employed by the Seventh Circuit.[3] The fact of the conspiracy is completely immaterial in the instant case. The foundation of respondent's claim in both lawsuits is its failure to obtain the electrical sub-contract irrespective of the alleged means used to thwart respondent, be they an alleged breach of contract or an alleged

[3] In *Williamson* the allegation was that the conspiracy was a continuing one, and, as noted, the court, nevertheless, had no difficulty in applying *res judicata*. *A fortiorari*, *res judicata* should have been applied in the instant case because the alleged conspiracy had ended.

conspiracy. The fact that respondent's claim is essentially the same in both lawsuits is further supported by the nature of the damages sought by respondent in the second lawsuit, to wit: "Plaintiff was deprived of its fair and reasonable profit on the said electrical subcontract . . ." (A. 9) which allegation is almost identical to the damages claimed in the first suit. Plainly, respondent in both lawsuits was suing for the loss of the sub-contract. The respondent should not be permitted to bring two suits to correct what obviously is one alleged wrong. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927).

This decision of the Seventh Circuit is in conflict with numerous decisions of the other circuits. In *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 295 F. 2d 362 (5th Cir. 1961), the plaintiff also first brought suit for breach of contract and then followed with a second suit alleging a violation of the antitrust laws. The Fifth Circuit affirmed the trial court's allowance of defendant's motion for summary judgment, and observed at 363-364:

> "It is settled, contrary to appellant's contention, that a litigant may not split his claim and have two trials on the same alleged breach of duty. Basically, Norman claimed that same 'right' in both suits—the right to purchase Gillette products direct from Gillette. The only wrong charged against Gillette was its refusal to continue to deal with Norman. We held in the contract case that Norman had not shown that Gillette wrongfully refused to deal with it. There, appellant relied upon the breach of Gillette's supposed contractual relationship as the basis of its claim. Here, appellant relies upon the breach of the antitrust laws as the basis for the alleged breach. But there was one breach and one only and appellant has had its day in court and has lost. 'It cannot litigate this same breach again.' Ballard v. First National Bank of Birmingham, 5 Cir., 1958, 259 F.2d 681;

Mendez & Company v. General Motors Corporation, 7 Cir., 1947, 161 F.2d 695, and Williamson v. Columbia Gas & Electric Company, 3 Cir., 1950, 186 F.2d 464, certiorari denied 1951, 341 U.S. 921, 71 S. Ct. 743, 95 L.Ed. 1355."

Notice that the first suit in *Norman Tobacco* was, as here, a contract action, and the second suit was, as here, an antitrust action. The decision in the case at bar is, therefore, in direct conflict with the decision of the Fifth Circuit in *Norman Tobacco*.

The decisions of the other Courts of Appeals which have dealt with this issue have also followed the principle that a litigant may not divide his grounds for recovery. See *Engelhardt* v. *Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964); *Wolcott* v. *Hutchins*, 245 F. Supp. 578 (S.D.N.Y. 1965), *aff'd*, 365 F.2d 833 (2d Cir. 1966); *Samuel Blanken & Co.* v. *Goldblatt*, 371 F.2d 949 (D.C. Cir. 1966). See also *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1927). As a matter of fact the present decision of the Seventh Circuit not only cites no authority for its holding that there are two causes of action involved but also is in conflict with an earlier decision of its own circuit, namely, *F. L. Mendez & Co.* v. *General Motors Corp.*, 161 F.2d 695 (7th Cir. 1947). This conflict with other circuits and with the decision of its own circuit demonstrates the inherent confusion surrounding the present cause-of-action test for *res judicata*. It is also persuasive evidence that this Court should grant certiorari to review this test in light of modern developments in the Federal Rules and to consider substituting as the standard for *res judicata* the "common-nucleus-of-operative-facts" test for the outmoded cause-of-action test.

Although petitioner believes that the present law requires a reversal of the Seventh Circuit's decision because

both lawsuits in question arose out of the same transaction and operative facts, if the test were that of a common nucleus of operative facts, the same result would be achieved, and it would be an easier test to administer for the courts. This test also more clearly serves the underlying rationale for *res judicata*. The decisions after *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), mentioned above, which have applied this test illustrate its ease of administration. See, *e.g.*, *United States ex rel. Mandel Bros. Contracting Corp.* v. *P. J. Carlin Constr. Co.*, 254 F.Supp. 637 (E.D.N.Y. 1966) and *American Foresight, Inc.* v. *Fine Arts Sterling Silver, Inc.*, 268 F.Supp. 656 (E.D. Pa. 1967).

The importance of review in this case is not lessened by the fact that when the trial judge in the second suit—the antitrust case—entered judgment, the judgment in the first suit had not yet been entered. The earlier case had been tried some six months earlier, briefs had been submitted, and there was nothing remaining except a decision. The judgment on the merits in the first suit was entered Monday, September 23, 1968, and the judgment holding the first suit to be *res judicata* was entered on Friday, September 20, 1968.

If there was a defect in timing of the judgment in the case at bar, this defect existed for only three days, and in any event, when this case reached the Seventh Circuit, the other case was consolidated with it and the Friday to Monday difference in dates of the judgments had become wholly immaterial. Moreover, there is authority for the proposition that a court may take judicial notice of a prior judgment so as to apply *res judicata* "to prevent additional repetitive litigation," *Holmes* v. *United States*, 231 F. Supp. 971, 972 (N.D. Ga. 1964), *aff'd per curiam*, 353 F.2d

785 (5th Cir. 1966). The Seventh Circuit should have followed *Holmes*. The *Holmes* decision is also in conflict with the decision of the Seventh Circuit.

If the reversal in the instant case by the Seventh Circuit on the ground that there was no final judgment is not reversed under the circumstances of the present case, it will surely weaken the doctrine of *res judicata*. The numerous public policy considerations in favor of finality of litigation are far too important to be ignored because the trial judge in the first suit filed did not enter judgment until three days after the trial judge decided the second case.

CONCLUSION

In view of the important considerations which we have set forth above, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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